NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: KIYOKO NAKANO, Debtor.	Case No. 2:19-bk-11179-RK Chapter 7 **MEMORANDUM DECISION ON MOTION OF CHAPTER 7 TRUSTEE FOR DISMISSAL OF BANKRUPTCY CASE AND RELATED RELIEF** Date: June 12, 2019 Time: 1:30 p.m. Place: Courtroom 1675 Roybal Federal Building 255 East Temple Street Los Angeles, CA 90013

This bankruptcy case came on for hearing before the undersigned United States Bankruptcy Judge on April 16, 2019 and June 12, 2019 on the Motion of Carolyn A. Dye, Chapter 7 Trustee ("Trustee"), for Dismissal of Case [11 U.S.C. § 521(i)2] ("Motion" or "Motion to Dismiss"), Docket Number 11, filed on March 25, 2019. The Trustee appeared for herself, and Yuki Kobayashi ("Mr. Kobayashi"), who purports to hold a power of attorney for Debtor Kiyoko Nakano ("Debtor" or "Mrs. Nakano"), appeared for himself and Debtor. This Memorandum Decision constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, made applicable here by Federal Rules of Bankruptcy Procedure 7052 and 9014(c).

The Motion was originally heard on April 16, 2019, and the court set a further hearing on June 12, 2019 to allow a further opportunity for Mr. Kobayashi to respond to Trustee's opposition and for further briefing and submission of evidence by the parties in response to their respective positions. Moreover, the court had ordered the transcript of the hearing on April 16, 2019 to obtain written confirmation of statements made by the parties at that hearing. The court also received evidence at the hearing on June 12, 2019, including the declarations and oral testimony of the parties and other witnesses and exhibits submitted by the parties as reflected in the court's evidentiary rulings made orally at the hearing. Having considered the evidence submitted in the moving and opposing papers, including the declarations of Mr. Kobayashi, the Trustee, and other witnesses, the testimony of the witnesses at the hearings, and the other papers and pleadings filed in this case, the court makes the following rulings on the Motion.

I. BACKGROUND

This bankruptcy case for Mrs. Nakano was commenced on February 5, 2019 upon the filing of a bankruptcy petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C., that was filled out and signed on behalf of Mrs. Nakano by Mr. Kobayashi as her purported attorney in fact. *Petition,* Docket Number 1. Mrs. Nakano herself did not sign the petition. *See id.*[1] The bankruptcy petition was a so-called "face sheet" filing because the only thing filed was the Official Form 101, Voluntary Petition for Individuals Filing for Bankruptcy without the bankruptcy schedules. *Id.* The bankruptcy petition listed Mrs. Nakano's address as 1338 2nd Avenue, Los Angeles, CA 90019 in Los Angeles County,

[1] In signing the petition for Mrs. Nakano, Mr. Kobayashi signed her name, stating "POA California Probate Code §§ 4401, 4459(f), 4450(c), (e), (f), (h)." *Petition,* Docket Number 1 at 6. However, he did not sign or state his name in signing her name on the petition to identify himself as the "POA" or power of attorney. Mrs. Nakano's signature is different from the signature for her by Mr. Kobayashi as shown on her notarized signature on the power of attorney. *Compare Power of Attorney, Exhibit A to Motion to Dismiss*, Docket Number 11, *with Petition*, Docket Number 1. His signature for her is one word, and by looking at this signature, one cannot see it is Kiyoko Nakano, but her actual signature on the notarized power of attorney is two words with Kiyoko Nakano clearly written out and understandable. *Id.* Mr. Kobayashi's signature for himself and his signature for Mrs. Nakano are different as shown by his signatures as her power of attorney and for himself on the opposition to the Motion to Dismiss. *Debtor and Yuki Kobayashi's Opposition to Trustee's Motion for Dismissal of Case,* Docket Number 15.

USA. *Id.* The petition also listed Mrs. Nakano's mailing address as "c/o Yuki Kobayashi, P.O. Box 19731, Los Angeles, CA 90019." *Id.*

The Official Form 121, Statement About Your Social Security Numbers, was filed with the petition on February 5, 2019, Docket Number 3, which listed Mrs. Nakano's social security number, and this form was signed by Mr. Kobayashi as "POA, California Probate Code §§ 4401, 4459(f), 4450(c), (e), (h), (j)." Attached to this form were a copy of a Uniform Statutory Form Power of Attorney purportedly signed by Mrs. Nakano and dated February 10, 2018, appointing Yuki Kobayashi, a.k.a. Yukoh Kobayashi, P.O. Box 19731, Los Angeles, CA 90019 as her agent (attorney-in-fact), and a copy of Mr. Kobayashi's California Senior Citizen Identification Card indicating his address as above and his birth year of 1942, showing him to be age 77. *Id.*

The bankruptcy schedules to the bankruptcy petition in the name of Mrs. Nakano were filed on February 19, 2019, and the schedules were filled out and signed for her by Mr. Kobayashi based on his purported authority as "POA" (power of attorney). *Bankruptcy Schedules,* Docket Number 9. Mrs. Nakano herself did not sign the schedules. *Id.* As on the petition, Mr. Kobayashi signed Mrs. Nakano's name as "POA," but did not state his name as the purported attorney-in-fact. *Id.; see Petition,* Docket Number 1. The Official Form 106Sum, Schedule of Your Assets and Liabilities and Certain Statistical Information, for Mrs. Nakano listed her total assets valued at $200,035.36, her total liabilities owed of at $19,443.52, her monthly income of $966 and her monthly expenses of $1,616. *Bankruptcy Schedules,* Docket Number 9 at 1.

The assets of Mrs. Nakano listed by Mr. Kobayashi, based on his purported authority as power of attorney, were set forth on Schedule A/B: Property and consisted of all personal property assets, including her cash and money deposits with a total value of $14,405.36, an emergency fund held in "Safe Keeping by an agent" (apparently, Mr. Kobayashi as agent based on his purported authority, holding a power of attorney) valued at $4,900, a claim against third parties, the landlord and the landlord's attorneys, for wrongful eviction valued at $150,000, a claim against a third party, a bank, for "refusal to

honor power of attorney" valued at $20,000, her clothes valued at $30, a claim for refund of attorneys' fees valued at $700 and her miscellaneous personal property valued at $10,000. *Id.* at 3-12*; see also Declaration of Yuki Kobayashi* attached to *Debtor and Yuki Kobayashi's Opposition to Trustee's Motion for Dismissal of Case,* Docket Number 15 (Mr. Kobayashi declaring that he is the agent, attorney-in-fact and caretaker of Mrs. Nakano).

On Schedule C: The Property You Claim as Exempt, certain assets of Mrs. Nakano were claimed as exempt by Mr. Kobayashi, based on his purported authority as power of attorney, including $30 of the value of her clothes and shoes claimed as exempt under California Code of Civil Procedure § 703.140(b)(3); $3,067.00 of the value of her checking account at Union Bank under 42 U.S.C. § 407; $38.67 of the value of her checking account at Chase Bank under 42 U.S.C. § 407; $11,115.00 of the value of her savings account at Union Bank under 42 U.S.C. § 407 and California Code of Civil Procedure § 703.140(b)(5); $164.69 of the value of her savings account at Dollar Savings Bank under 42 U.S.C. § 407; $43,910.00 of the value of claims against third parties under California Code of Civil Procedure § 703.140(b)(11)(D) and California Code of Civil Procedure § 703.140(b)(5); $4,900.00 of the value of her emergency fund in "Safe Keeping" under 42 U.S.C. § 407; $20 of the value of her cash under 42 U.S.C. § 407; $700.00 of the value of her claim for refund of attorneys' fees under 42 U.S.C. § 407; and $10,000.00 of the value of her appliances and furnishings under California Code of Civil Procedure § 703.140(b)(5). Docket Number 9 at 13-14. All of Mrs. Nakano's cash, bank deposits and personal property were claimed as exempt, except for the value of claims against third parties in excess of the claimed exempt amount of $43,910.00. *Compare* Schedule C, *with* Schedule A/B, Docket Number 9.

The liabilities of Mrs. Nakano listed by Mr. Kobayashi, based on his purported authority as power of attorney, were set forth on Schedule E/F: Creditors Who Have Unsecured Claims and consisted of all nonpriority unsecured claims, including a claim for Alden Terrace scheduled in the amount of $3,211.00; a claim for AT&T U-Verse scheduled in the amount of $172.05; a claim for Century Radiology Medical Group in the

amount of $1.031.00; a claim for City of Los Angeles Fire Department – Ambulance scheduled in the amount of $1,509.00; a claim for City of Los Angeles Fire Department – Ambulance scheduled in the amount of $1,087.00; a claim for ELADH, LP scheduled in the amount of $1,338.00; a claim for Internal Medicine MDS Corp. scheduled in the amount of $181.19; a claim for Israel Gorinstein, M.D., scheduled in the amount of $749.00; a claim for La Brea Rehabilitation Center scheduled in the amount of $922.42; a claim for Lifeline Ambulance scheduled in the amount of $276.80; a claim for Morgan McMullin, McMillan Living Trust scheduled in the amount of $7,300.00; a claim for Olympia Medical Center scheduled in the amount of $40.38; a claim for Olympia Medical Center scheduled in the amount of $1,316; a claim for On Line Radiology Medical Group scheduled in the amount of $117.91; a claim for Point Anesthesia Services, PC, scheduled in the amount of $162.50; and a claim for White Memorial Medical Group, Inc. scheduled in the amount of $89.27. *Id.* at 15-26. All of these claims scheduled by Mr. Kobayashi for Mrs. Nakano were listed as disputed, if not also contingent and/or unliquidated. *Id.* None of these scheduled claims were undisputed. *Id.*

On Schedule G: Executory Contracts and Unexpired Leases, Mr. Kobayashi, as purported power of attorney for Mrs. Nakano, listed as executory contracts or unexpired leases: "Residential rental contract Month to Month, but rent controlled [apartment] unexpired, executory" lease at 1338 2nd Ave., Los Angeles, CA 90019 with Morgan McMullin, McMullin Living Trust; telephone service – landline with AT&T; gas service with SoCal Gas; and "roommate agreement" with Yuki Kobayashi. *Id.* at 27.

On Schedule H: Your Codebtors, Mr. Kobayashi, as purported power of attorney for Mrs. Nakano, listed Frank Nakano (deceased) as her spouse in answer to the question whether she lived in a community property state. *Id.* at 28.

On Schedule I: Your Income, Mr. Kobayashi, as purported power of attorney for Mrs. Nakano, listed her total monthly income of $966, which was from Social Security. *Id.* at 29-30.

On Schedule J: Your Expenses, Mr. Kobayashi, as purported power of attorney for Mrs. Nakano, listed her total monthly expenses of $1,616, including $600 in rental or home ownership expenses; $10 in electricity, heat, or gas expenses; $6 in telephone expenses; $10 in clothing expenses; $10 in personal care product expenses; $500 in medical and dental expenses; $30 in transportation expenses; $20 in entertainment expenses; and $300 in other expenses, specifically, "caretakers" (apparently, referring to himself). *Id.* at 31-33.

The Official Form 106, Declaration About an Individual Debtor's Schedules, Mr. Kobayashi, as purported power of attorney for Mrs. Nakano, signed the statement: "Under penalty of perjury, I declare that I have read the summary and schedules filed with this declaration and that they are true and correct." *Id.* at 34. Mr. Kobayashi signed this declaration with Mrs. Nakano's name, identifying his authority to sign her name as "POA, California Probate Code §§ 4401, 4459(f)," but he did not state his own name as attorney-in-fact. *Id.* at 34.

On the Official Form 107, Statement of Financial Affairs for Individuals Filing for Bankruptcy, Mr. Kobayashi, as purported power of attorney for Mrs. Nakano, listed her other income from January 1 of the current year (2019) to the date of filing of the bankruptcy case in the amount of $1,906 with Social Security as the sources of income, for the last calendar year (2018) in the amount of $10,800 with Social Security as the sources of income, and for the calendar year before that (2017) in the amount of $9,576 with Social Security as the sources of income. *Id.* at 35-46.

The Trustee filed her Motion to Dismiss on March 25, 2019. *Trustee's Motion for Dismissal of Case [11 U.S.C. § 521(i)2]; Declaration of Carolyn A. Dye in Support thereof*, Docket Number 11. The Trustee served notice of her Motion to Dismiss on March 25, 2019 by mail on Debtor at the mailing address listed on the petition by Mr. Kobayashi, which was his mailing address; on Mr. Kobayashi at his mailing address; on the United States Trustee; and on all creditors. *Trustee's Notice of Motion for Dismissal of Case [11 U.S.C. § 521(i)2],* Docket Number 12, filed on March 25, 2019. The Trustee stated in the

Motion that she was requesting dismissal of this Chapter 7 bankruptcy case as a party in interest pursuant to 11 U.S.C. § 521(i)(2). *Motion to Dismiss,* Docket Number 11.

In the Motion to Dismiss, the Trustee asserted that at the meeting of Debtor's creditors under 11 U.S.C. § 341(a), Mr. Kobayashi appeared and presented a California ID card and social security card, which he said were Debtor's, that he said that Debtor was in a nursing home, that his reason for filing this bankruptcy case had to do with a state court unlawful detainer proceeding, and that he was Debtor's roommate and was trying to protect his right to live in the apartment. *Id.* at 2.

The Trustee also asserted that at the meeting of creditors, Mr. Kobayashi presented the purported power of attorney, a copy of which she attached as Exhibit A to the Motion. *Id.* and Exhibit A attached thereto.[2] The power of attorney indicated that it was a "Uniform Statutory Form Power of Attorney (California Probate Code Section 4401)." *Id.* The power of attorney indicated that Kiyoko Nakano appointed Yuki Kobayashi, also known as Yukoh Kobayashi, P.O. Box 19731, Los Angeles, CA 90019, as her agent or attorney in fact to act regarding "ALL OF THE POWERS LISTED ABOVE," including real property transactions, tangible personal property transactions, stock and bond transactions, commodity and option transactions, banking and other financial institution transactions, business operating transactions, insurance and annuity transactions, estate, trust and other beneficiary transactions, claims and litigation, personal and family maintenance, benefits from social security, Medicare, Medicaid, or other governmental programs, or civil or military service, retirement plan transactions, and tax matters. *Id.* The power of attorney also included "SPECIAL INSTRUCTIONS": "My agent may enter, use, or live in my apartment as a roommate or a caretaker for 10 years from this date. Also, my agent has the power to handle all transactions relating to my past, present and future residence and rental properties. The roommate rights survives

[2] Mr. Kobayashi does not dispute that Exhibit A was a true and accurate copy of the purported power of attorney. *Debtor and Yuki Kobayashi's Opposition to Trustee's Motion for Dismissal of Case,* Docket Number 15 at 2.

[sic] my death." *Id.* The power of attorney also contained the following language: "UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED." *Id.* There were no directions otherwise in the power of attorney. *Id.* The power of attorney also stated: "This power of attorney will continue to be effective even though I become incapacitated." *Id.* The power of attorney was purportedly signed by Kiyoko Nakano and dated February 10, 2018. *Id.* The certificate of acknowledgment of notary public on the form under Mrs. Nakano's signature was not filled out, except for the statement, "See attached 'loose' notarial certificate." *Id.* A California All-Purpose Acknowledgment was attached to the power of attorney with the signature and notarial seal of David L. Ransom, Jr., California Notary Public, Commission #2217563 (commission expiration date of November 5, 2021) and dated February 10, 2018, stating the title or type of document was a Uniform Statutory Form Power of Attorney. *Id.*

The Trustee stated her concerns about Mr. Kobayashi and his use of the power of attorney for Debtor: "Based on his appearance at the 341(a) Meeting of Creditors, somewhat disheveled and in my view, shifty, I have concerns that the Debtor may not fully appreciate the implications of giving Kabayashi [sic] a Power of Attorney. The fact that he lists as an asset a claim against a bank for not recognizing the Power of Attorney is very troubling. As a result I have made a referral to the U.S. Trustee of this case and requested that an elder abuse investigation be initiated." *Id.* at 5.

The Trustee was concerned about the execution of the power of attorney, and she stated that she contacted the notary public who witnessed the signing of the power of attorney, and the notary public told her that his notary notes indicated that the power of attorney was signed at 124 South Hoover Street, Los Angeles, which was reportedly a nursing home where Debtor was staying at the time. *Id.* at 2 and 5.[3]

[3] The fact that the notary witnessed the signing of the power of attorney at Debtor's nursing home, as asserted by the Trustee, is not disputed by Mr. Kobayashi either in his original opposition to the Motion or his opposition to the Trustee's supplemental support for the Motion. *Debtor and Yuki Kobayashi's*

(Continued...)

The Trustee acknowledged in the Motion that a power of attorney may be used to file a bankruptcy case on behalf of someone else, but she asserted that this power of attorney presents no such authority on its face and does not empower Mr. Kobayashi to file a bankruptcy case for Debtor, and thus the case should be dismissed. *Motion to Dismiss*, Docket Number 11 at 2-4. The Trustee further argued that on the face of the schedules, it appeared that Debtor was solvent, "having more [ ] cash than debts," and thus, "[s]he would clearly not need a discharge under these circumstances and the filing of this case could damage her credit standing." *Id.* at 3. The Trustee asserted that the schedules indicated that Debtor had in excess of $200,000 of cash in the bank and only $19,000 in scheduled debt. *Id.* at 2.

In the Motion, the Trustee stated: “It is clear from the testimony given at the 341(a) Meeting of Creditors that Debtor’s interest [sic] are not being served and the Power of Attorney does not empower Kabayashi [sic] the authority to file a bankruptcy case. In fairness to creditors, Trustee is of the view that the case should be dismissed so that creditors may do their own investigation and pursue claims if they so choose.” *Id.* at 3.

Mr. Kobayashi filed a written opposition to the Motion on April 2, 2019, stating that the Motion had "no merits" and should be denied. *Debtor and Yuki Kobayashi's Opposition to Trustee's Motion for Dismissal of Case,* Docket Number 15. In support of his opposition, Mr. Kobayashi submitted his declaration under penalty of perjury. *Id.* at 2-7. In his declaration, Mr. Kobayashi attested that "[s]ince 2-10-2018, I have been and am Attorney-in-fact of debtor Kiyoko Nakano, who is 86 years old, mentally and physically disabled, Japanese lady and has no family or relative in this country." *Id.* at 2. Mr. Kobayashi further stated in his declaration: "Because I owed fiduciary duties to the principal, debtor Kiyoko Nakano, to protect her interests and life-time saving of small assets, I spent 3 to 4 months to study a Nolo's bankruptcy self-help book and fill out one hundred pages of petition and schedules without being paid," and "I understood and

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Opposition to Trustee's Motion for Dismissal of Case, Docket Number 15; *Debtor's Opposition to Trustee's Supplemental Support for Motion for Dismissal of Case,* Docket Number 28 at 6.

carried out to my best the principle that my own interests were secondary to the principal's ones." *Id.* at 2.

According to Mr. Kobayashi in his declaration, "The debtor married to an American soldier in Japan and came to the U.S. 50 years ago. She has lived for 50 years in this country and after she lost her husband a few years ago, what she has now is approximately $14,000 cash in a bank. This fund is saving of social security benefits of both husband and wife for life-time. The debtor needs this fund for her funeral expenses or should she decide to go back to Japan, she would need this fund for travel expenses and finding a home in Japan." *Id.* at 2.

In his declaration, Mr. Kobayashi asserted that "Trustee absolutely fails to understand and recognize the conditions of the debtor." *Id.* at 2. Mr. Kobayashi then described Mrs. Nakano's conditions: "The 86 year old lady debtor has lost her mental and physical strength due to her age. She did not have a car, she lost the strength to walk to a bus stop without someone's help, she could not buy foods, she could not cook meals, she could not pay rent and utility bills, she could not check her mails each day and timely respond to important mails, etc. Obviously, she needed to live in a nursing home, but her social security income was not enough to pay nursing home costs and also she hated and stubbornly refused to got [sic] into a nursing home. Thus, the debtor needed a caretaker who could go shopping for foods, cook meals, pay rent and utility bills, and live in her apartment so that she could be taken cared of day and night, 7 days a week. Without a caretaker, the debtor would have died of hunger long time ago. Since the debtor had no family or relative in this country and no person was found who was willing to take care of the debtor, I was compelled to become attorney-in-fact and live in her apartment as a roommate. If the debtor did not need a caretaker, I had no reason to become her attorney-in-fact." *Id.* at 2-3.[4]

[4] Based on the age stated on Mr. Kobayashi's California identification card, he is nine years younger (age 77) than Mrs. Nakano (age 86). Official Form 121, Statement About Your Social Security Numbers, Docket Number 3 at 5.

Although Mr. Kobayashi is not a relative of Mrs. Nakano, he explained how he knew so much of her financial and personal affairs in his declaration: "I have been taken [sic] care of debtor's finance since March 2017 till the presence [sic] and, thus, I have personal knowledge of debtor's financial transactions and conditions," *id.* at 3, and "I had actually lived in, occupied, and resided in the apartment for 10 months or so as a roommate and took care of the 86 year old debtor," *id.* at 4. Mr. Kobayashi elaborated: "In fact, regardless of absence or presence of the debtor or with or without the Power of Attorney, I have been a roommate and caretaker of the debtor, had a key to the apartment, lived in, occupied, and resided in the apartment for approximately 10 months until landlord changed locks, and helped the debtor with daily foods, meals, paying rent and utility bills, receiving mails, responding to important mails, etc. Without my help, the debtor would have died of hunger long time ago." *Id.* at 6.

In his opposition to the Motion, Mr. Kobayashi denied that Mrs. Nakano is now living in a nursing home, arguing that her living there is not relevant: "I don't know how this point is relevant to this bankruptcy case, but again, this is a false statement of the truth. The debtor is not currently residing in a mere nursing home, but due to her bodily injury, the debtor was hospitalized and is now being treated at a rehabilitation facility. Also, the debtor did not voluntarily leave her apartment. The debtor was forced to leave her apartment. I personally know this, because while I was living with the debtor for many months, the debtor always said to me that she did not want to go to a nursing home. If the debtor left the apartment voluntarily, she would have told me so before she left. She disappeared from the apartment without my knowledge. She never mentioned to me about her plan to go to a nursing home." *Id.* at 5.

In the opposition to the Motion, Mr. Kobayashi disagreed with the Trustee's assertion that Debtor had an excess of cash in the bank and only $19,000 in scheduled debt. *Id.* at 4. He stated that "this is a false statement of the truth" and "Trustee deliberately committed perjury." *Id.* He correctly pointed out the $200,000 figure on the schedules was not "cash in the bank," but "total financial/personal assets," including

$170,000 in claims against third parties. *Id.; see also* Schedule A/B: Property, Docket Number 9 at 10.

In the opposition to the Motion, Mr. Kobayashi also took offense that the Trustee referred to him in the Motion as "disheveled" and "shifty," stating that these descriptions were racial slurs against Asians, specifically against him as a Japanese man, and were grounds to disqualify the Trustee from this case. Docket Number 15 at 7.

The Trustee filed a reply to the opposition on April 12, 2019. *Trustee's Reply to Opposition filed by Yuki Kobayashi to Trustee's Motion for Dismissal of Case [11 U.S.C. § 521(i)2]; Declarations of Morgan McMullin and Houston Touceda in Support thereof*, Docket Number 19. In her reply, the Trustee reiterated her contentions that the case was not authorized by the power of attorney presented because Mrs. Nakano was not competent when she signed the power of attorney because Mr. Kobayashi "fails to address whether the debtor, who he admits is 'mentally and physically disabled' was legally competent to execute the Power of Attorney in the first place in February 2018." *Id.* at 2. In support of her reply, the Trustee submitted the declaration of Morgan McMullin, the former landlord of Mrs. Nakano's apartment at 1338 2nd Avenue, Los Angeles, California 90019, who stated that she was his tenant for many years, was admitted to a nursing home called Alden Terrace in January 2018, lived there a few months, went home to her apartment, and a week later, had a fall resulting in a broken hip, was admitted to the La Brea Rehabilitation Center after being discharged from the hospital, and had not lived in the apartment since that fall. *Id.* at 4. Mr. McMullin in his declaration stated that she signed letters in January 2018, stating that Mr. Kobayashi was not to be given access to her apartment. *Id.* According to Mr. McMullin, Mr. Kobayashi was never an occupant of Mrs. Nakano's apartment. *Id.* at 5. According to Mr. McMullin, Mrs. Nakano did not live in the apartment after her fall and admission to La Brea Rehabilitation Center in April 2018 as indicated in her admission record to the facility dated April 6, 2018. *Id.* at 5 and 20 and Exhibit D attached thereto. The admission record for Mrs. Nakano indicated that she was being admitted with a primary diagnosis of a

fractured left femur (thighbone), a secondary diagnosis of right hip pain and another diagnosis of "unspecified dementia without behavior disturbance." *Id.* [5]

The Trustee, in her reply to the opposition, also conceded that she was inaccurate in describing how much cash was reported on the "Debtor's accounts" [i.e., schedules]. *Id.* at 2.

The court conducted the initial hearing on the Trustee's Motion to Dismiss on April 16, 2019. A written transcript of the proceedings at this hearing was filed on April 26, 2019, Docket Number 22. At the hearing, Mr. Kobayashi stated that Mrs. Nakano was a housewife, that she was 86 years old now, that her husband died about three years ago, that he was not a relative of hers, that she had no relatives, that she had no children and that she is alone. *Id.* at 18-19. In explaining his relationship with Mrs. Nakano, Mr. Kobayashi stated that he is a neighbor and friend and became her roommate for about two years. *Id.* at 19. He also said about Mrs. Nakano that "she's not [a] sophisticated person" and that "she's a very simple-minded person." *Id.* He said that Mrs. Nakano had both mental and physical issues, that she is in a wheelchair and cannot walk anymore, and that she cannot remember. *Id.* at 19-20. He said that she is staying in a hospital now and that he last visited her there in December 2018, but that he used to visit her very often, but stopped because he was prevented from visiting her by the staff at the facility who called the police whenever he went there. *Id.* at 20-21.

With leave of court, the Trustee filed a supplemental brief with additional evidence in support of the Motion to Dismiss on May 7, 2019. *Trustee's Supplemental Support for Trustee's Motion for Dismissal of Case,* Docket Number 25. The Trustee filed her supplemental declaration stating that she had visited Mrs. Nakano at the La Brea Rehabilitation Center where she now resides and spoke with her as well as facility

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[5] Mr. Kobayashi objected to the admission record on grounds of relevance and hearsay. The court overruled the relevance objection at the hearing but did not rule on the hearsay objection at the hearing. The court now rules on the hearsay objection and overrules it on grounds that the admission statement is not being admitted for the truth of the matter asserted that she was incompetent, but it is admitted to show that Mrs. Nakano was already diagnosed with dementia and was being admitted for treatment at the nursing care facility for that reason.

personnel, including the facility administrator, Thomas Mead, and a social worker, Veronica Cervantes. *Id.* at 4-5. The social worker, Ms. Cervantes, took the Trustee to Mrs. Nakano's room, and the Trustee introduced herself to Mrs. Nakano, observed her reactions, and tried to engage her in conversation. *Id.* According to the Trustee, Mrs. Nakano appeared very frail physically, understood some of what the Trustee said, but responded randomly in Japanese and could not remember her age or details of her early years. *Id.*

The Trustee stated that she then spoke with Mr. Mead, the administrator of the facility, who told her that Mr. Kobayashi last visited the center on December 24, 2018 and had to be escorted out of the facility by the police because he became aggressive with staff. *Id.* at 5. The Trustee asked Mr. Mead for a declaration to this effect, but he declined, saying that he would testify if a subpoena was sent, but instead later sent a letter confirming their conversation which was attached as Exhibit A. *Id.* and Exhibit A attached thereto. Mr. Mead's letter stated that Mrs. Nakano had been a long-term patient at the La Brea Rehabilitation Center since April 2018 with a primary diagnosis of "failure to thrive" and another diagnosis of Alzheimer's disease. *Id.* Mr. Mead further stated in this letter that Mrs. Nakano is "a very pleasant woman who can answer simple questions regarding her immediate physical needs (such as if she is tired, hungry or in pain) but has cases of confusion and is not able to make sound decisions." *Id.* According to Mr. Mead, "[w]hen medical decisions need to be made, the interdisciplinary team [at the facility] meets together, along with recommendations from her physician (when necessary), Dr. Shadi, and makes decisions that are in the best interest of Ms. Nikano [sic]." *Id.* Based on this information, the Trustee argues that given Mrs. Nakano's present condition, it is doubtful that she was competent to sign the power of attorney in 2018, and the Trustee reiterated her contentions that the court should find that this bankruptcy case was not authorized by Debtor, serves no legitimate purpose, and should be dismissed. *Id.* at 3.

In her supplemental brief, the Trustee also requested that the court order Mr. Kobayashi to turn over Mrs. Nakano's original social security card, her California

identification card, and other documents in his possession to her so these documents can be placed in her file at the facility where she is being care for. *Id.* at 3. However, this request for relief was made for first time in the Trustee's supplemental pleading and was not made in her original motion.

Mr. Kobayashi filed an opposition to the Trustee's supplemental brief and evidence on May 21, 2019, Docket Number 28, reiterating that the Motion has "no merits" and should be denied. He said that he was filing "this opposition to protect his authority as attorney-in-fact of debtor Nakano as well as his principal Nakano's interests as an exercise of fiduciary duties owed to the principal." *Id.* at 1. In this opposition, Mr. Kobayashi interposed evidentiary objections to the exhibits attached to the Trustee's reply to his opposition filed on April 12, 2019 and the declaration of E. Houston Touceda, the former landlord's attorney, on grounds of relevance, hearsay and/or privileged medical information, and to Mr. Mead's letter attached to the Trustee's supplemental brief on grounds of relevance and hearsay. *Id.* at 2-3.

Mr. Kobayashi in his opposition to the Trustee's supplemental brief contended, regarding Mrs. Nakano's mental capacity to execute the power of attorney in February 2018, that the Trustee "totally fails to present any evidence to prove lack of such mental capacity." *Id.* at 6. He said that "although debtor Nakano may have a memory-loss disorder, it does not and should not mean that she has no mental capacity to understand things. Indeed, I believe Debtor can understand certain things, not to say everything, if explained well in Japanese, not in English. Her proficiency in English was and is very limited as she was born and graduated schools in Japan." *Id.* Explaining the circumstances of Debtor's execution of the power of attorney, Mr. Kobayashi stated:

> I explain here the circumstances surrounding Debtor's execution of the power of attorney, if Court is interested. For several months before Debtor executed the power of attorney in February 2018, Debtor and I were discussing possibility or choice of setting up a power of attorney to appoint her agent or caretaker. Originally, Debtor insisted that she did not need such agent or caretaker. However, as time went on, Debtor became unable to go shopping for foods or cook meals by herself. Thus, I think she came to understand that she needed an agent or caretaker. I explained to

> her what was a power of attorney and it had to be signed before a notary public. I explained these in Japanese and she understood or appeared to understand them.
>
> I thought it was better for her to execute a power of attorney before she completely lost mental power. So, I told Debtor that I would bring a notary public in a few days. I chose an experienced notary public, rather than young one, so everything would be done properly. One day, I brought a notary public and while he was watching, Debtor signed a power of attorney. I witnessed it. I had no doubt about Debtor's understanding of the power of attorney. Also, if the notary had any doubt about Debtor's understanding, he would not have notarized the document.

Debtor's Opposition to Trustee's Supplemental Support for Motion for Dismissal of Case, Docket Number 28 at 6-7.

II. DISCUSSION

1. Legal Basis for the Motion.

In the Motion to Dismiss, the Trustee requested that this bankruptcy case be dismissed because it was not authorized by Debtor and serves no legitimate purpose, citing 11 U.S.C. § 521(i)(2) as the legal authority for the motion. Docket Number 11 at 3-4. The Trustee makes three specific arguments in support of the Motion to Dismiss: (1) the power of attorney given by Debtor to Kobayashi in February 2018 (Exhibit A to Motion to Dismiss) does not on its face authorize him to file a bankruptcy case for her, *see Motion*, Docket Number 11 at 3; (2) Debtor is solvent based on the schedules showing more cash than debts, and thus she does not need a discharge, so there is no legitimate purpose for the bankruptcy case, *see* Motion to Dismiss, Docket Number 11 at 3; (3) Debtor's current physical condition indicates that she lacked the capacity to sign the power of attorney in February 2018, and therefore the bankruptcy petition is ineffective because Debtor was not competent when she signed the power of attorney, *see Trustee's Supplemental Brief*, Docket Number 25 at 3.

Mr. Kobayashi argues that the Motion to Dismiss should be denied because: (1) the powers granted in the power of attorney, which is a California Uniform Statutory Form Power of Attorney provided under California Probate Code § 4401, include the authority to act with respect to bankruptcy proceedings under California Probate Code § 4459, *see*

Debtor and Yuki Kobayashi's Opposition to Trustee's Motion for Dismissal of Case, Docket Number 15 at 2 and 4; (2) the bankruptcy case has a legitimate purpose because Debtor has medical and other debts scheduled on her bankruptcy petition and she has limited assets to pay these debts and was receiving calls and letters from creditors demanding payment, *see Debtor and Yuki Kobayashi's Opposition to Trustee's Motion for Dismissal of Case,* Docket Number 15 at 4-5; and (3) Debtor did not lack mental capacity to sign the power of attorney in February 2018, stating at the time that he explained it to her in Japanese and that he observed that she understood or appeared to understand his explanation, *see Debtor's Opposition to Trustee's Supplemental Support for Motion for Dismissal of Case,* Docket Number 28 at 5-8.

The legal authority that the Trustee cites in support of the Motion to Dismiss, 11 U.S.C. § 521(i)(2), provides that (1) any party in interest may request that the court enter an order dismissing the case if it is one described in 11 U.S.C. § 521(i)(1) involving an individual debtor in a voluntary case under Chapter 7 or 13 of the Bankruptcy Code, 11 U.S.C., and (2) the debtor fails to file all of the information required under 11 U.S.C. § 521(a)(1) within 45 days of the filing of the bankruptcy petition. 11 U.S.C. § 521(i)(1) and (2). The information required under 11 U.S.C. § 521(a)(1) includes a list of creditors, a schedule of assets and liabilities, a schedule of current income and expenses, a statement of the debtor's financial affairs, copies of payment advices within 60 days of the petition date from an employer, a statement of intention with respect to retention or surrender of encumbered property, and recorded information relating to property of the bankruptcy estate. 11 U.S.C. § 521(a). Apparently, the Trustee invokes 11 U.S.C. § 521(i)(1) and (2) based on the alleged ineffectiveness of the power of attorney to Mr. Kobayashi for him to sign the bankruptcy petition to commence the bankruptcy case under 11 U.S.C. § 301 and Federal Rules of Bankruptcy Procedure 1002, 1004.1, and 9011 based on insufficient evidence of the competence of Mrs. Nakano to have effectively executed the power of attorney. That is, the Trustee's argument is apparently that not all of the required information under 11 U.S.C. § 521(a) has been timely filed within 45 days

of the petition date because there is insufficient information to demonstrate authority to file the bankruptcy petition.

The court determines that the Trustee's Motion to Dismiss is more appropriately considered under an alternative statutory provision, 11 U.S.C. § 707(a), for dismissal of a Chapter 7 bankruptcy case for cause, because the Trustee's Motion is premised on a lack of authority to file the bankruptcy petition based on the ineffectiveness of the power of attorney due to lack of competence of the principal, Debtor. While 11 U.S.C. § 707(a) provides three examples of "cause" that would support dismissal of a Chapter 7 bankruptcy case, "[t]he examples are merely illustrative, and the court may dismiss the case on other grounds when cause is found to exist." 6 Levin and Sommer, *Collier on Bankruptcy*, ¶ 707.03[1] at 707-15 and n. 2 (16th edition 2019) (citing *In re Atlas Supply Corp.*, 857 F.2d 1061 (5th Cir. 1988); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 380 (1977), *reprinted in* App. Pt. 4(d)(i); S. Rep. No. 95-989, 95th Cong., 2d Sess. 94 (1978), *reprinted in* App. Pt. 4(e)(i)). Lack of proper authority to file is not one of three examples listed in 11 U.S.C. § 707(a), but nonetheless constitutes cause for dismissal under that provision because the bankruptcy court, as a court of equity, is not limited in defining cause. *See In re Hickman,* 384 B.R. 832, 840 (9th Cir. BAP 2008); *In re Sullivan,* 30 B.R. 781, 782 (Bankr. E.D. Pa. 1983) (dismissing Chapter 7 bankruptcy case filed for debtor by his brother based on limited power of attorney for lack of authority). If authority to file a bankruptcy petition to commence a Chapter 7 bankruptcy case is insufficient, this is cause for dismissal of a Chapter 7 bankruptcy case under 11 U.S.C. § 707(a) because such a bankruptcy case violates the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. Pursuant to 11 U.S.C. § 301 and Federal Rules of Bankruptcy Procedure 1002 and 9011, a voluntary petition under Chapter 7 of the Bankruptcy Code to commence a Chapter 7 bankruptcy case must be signed by the attorney of record or the party not represented by an attorney of record. Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, if the debtor is an infant or incompetent person, the petition may be signed by a representative, including a general guardian, committee, conservator or

similar fiduciary, a next friend, or guardian ad litem, including a guardian ad litem appointed by the court to protect the infant or incompetent debtor.

2. Debtor Did Not Consent to, Nor Was She Informed of, the Bankruptcy Filing.

In considering Trustee's grounds for the Motion based on the power of attorney and Kobayashi's opposition thereto, the evidence indicates that Mrs. Nakano signed a California Uniform Statutory Form Power of Attorney in February 2018, which on its face was duly notarized by the attached notary acknowledgment, and the Trustee obtained oral confirmation by the notary public that he witnessed the signature. The power of attorney was a statutory form power of attorney that authorized Mr. Kobayashi to act as the agent and attorney in fact for Mrs. Nakano to exercise numerous powers to act on her behalf, including specifically acting for her regarding claims and litigation, which would authorize him to file a bankruptcy proceeding for Debtor, his principal, based on express statutory language of California Probate Code § 4459(f). *See In re Sniff,* No. 15-18086 TBM, 2015 WL 7351477 (Bankr. D. Colo. 2015) (holding that holder of a durable power of attorney under Colorado Uniform Power of Attorney Act not specifically referring to bankruptcy issues may file a bankruptcy petition for another individual). Thus, the Trustee's argument that the power of attorney cannot authorize a person to file a bankruptcy case for another unless there is specific authorization to file a bankruptcy case in the language of the power of attorney lacks merit as to a statutory form power of attorney in California.

In addressing the arguments of both parties on whether Mr. Kobayashi can properly file a bankruptcy case on another person's behalf (in this case, Debtor) using a power of attorney, the court notes that neither party provided the court with much analysis of the law regarding the authority of a person to file a bankruptcy case on another individual's behalf. Based on the court's research, the legal authorities on this issue are mixed and not well-developed, and there is no definitive case law in this circuit, the Ninth Circuit. *See* 8A *Corpus Juris Secundum,* Bankruptcy, § 41 (online edition, March 2019 update) (citing, *inter alia,* Federal Rule of Bankruptcy Procedure 1004.1; *In re Vitagliano,* 303 B.R. 292 (Bankr. W.D.N.Y. 2003); *In re Hurt,* 234 B.R. 1 (D. N.H. 1999); *In re*

Washington, 297 B.R. 662 (Bankr. S.D. Fla. 2003); *In re Sullivan,* 30 B.R. 781 (Bankr. E.D. Pa. 1983)); *see also In re Spurlin,* 664 F.3d 954 (5th Cir. 2011); *In re Ballard,* No. I-87-00718, 1987 WL 191320 (Bankr. N.D. Cal. 1987); *In re Eicholz,* 310 B.R. 203 (W.D. Wash. 2004); *In re Sniff,* No. 15-18086 TBM, 2015 WL 7351477 (Bankr. D. Colo. 2015); *In re Raymond,* 12 B.R. 906 (Bankr. E.D. Va. 1981).

After considering the various legal authorities on the issue, the court determines that there is persuasive case law that recognizes that a general power of attorney may be used to file a bankruptcy case for another. *In re Ballard,* No. I-87-00718, 1987 WL 191320 (Bankr. N.D. Cal. 1987); *accord In re Spurlin,* 664 F.3d 954, 959 (5th Cir. 2011); *In re Matthews,* 516 B.R. 99, 102 and nn. 2 and 3 (Bankr. N.D. Tex. 2014). In *Ballard,* the bankruptcy court upheld the filing of a Chapter 13 bankruptcy petition by a wife on behalf of her husband, who was a military serviceman stationed overseas, using a general power of attorney where the foreclosure of the family residence was imminent and there was no time to get the husband's signature on the petition. *In re Ballard,* 1987 WL 191320, slip op. at *1. The court in *Ballard* disagreed with the logic of cases that held that the filing of a bankruptcy petition is too personal to allow a power of attorney to be used, stating that "the act of filing a bankruptcy petition primarily concerns the preservation of property and does not seem so personal that it cannot ever be done by proxy." *Id.* In that court's view, there was good policy reason to allow military service members to use a power of attorney to allow the "home front" spouse to conduct whatever business that may arise in their absence, including seeking the protection of the bankruptcy laws in emergencies. *Id.* The court in *Ballard* quoted another court that allowed the filing of a bankruptcy petition by power of attorney that specifically authorized a bankruptcy filing, stating: "A few situations may, in urgency, require individual remedies. The Bankruptcy Court is still a court of equity." *Id.* (quoting *In re Sullivan,* 30 B.R. 781, 782 (Bankr. E.D. Pa. 1983)). The court in *Ballard* allowed the filing of the bankruptcy petition for the husband debtor based on a general power of attorney given to the wife which did not specifically mention bankruptcy. *Id.* The court in *Ballard* held that the clerk of court was to accept and file the bankruptcy

petition, the clerk was to immediately mail notice to the husband debtor that his wife using the power of attorney filed a bankruptcy petition on his behalf, and that the bankruptcy case would be dismissed as to the husband debtor if within a reasonable time that the debtor notified the court that the bankruptcy filing was outside the scope of the power of attorney. *Id.*

Following the bankruptcy court's decision in *Ballard,* the United States Court of Appeals for the Fifth Circuit in *In re Spurlin* held that a debtor could be criminally convicted for a bankruptcy crime of concealment of bankruptcy assets in her bankruptcy case where her husband filed the bankruptcy case for her using a general power of attorney and that there was sufficient evidence for a jury to find that she ratified the bankruptcy filing. 664 F.3d at 958-960. The Fifth Circuit in *In re Spurlin* stated:

> We conclude, agreeing with *Ballard,* that a general power of attorney may be used to file for bankruptcy on another's behalf. General powers of attorney allow someone to manage another person's affairs. Although certain matters are too personal to be entrusted to another, bankruptcy is primarily for property protection and is not as profoundly personal as divorce or enlistment. Declaring voluntary bankruptcy is about saving a person's assets where all else fails, and entrusting management of one's property to that someone includes giving him the tools to protect as much as he can if the worst happens. *Ballard* allows the holder of the power of attorney to declare bankruptcy but prevents abuse by requiring the debtor to be informed and dismissing if the debtor feels bankruptcy is improper. This gives the holder of the power of attorney flexibility to protect and manage that person's assets, while including a failsafe to prevent abuse.

In re Spurlin, 664 F.3d at 959; *accord In re Matthews,* 516 B.R. at 102-103.

In *Matthews*, a woman's niece filed a Chapter 7 bankruptcy petition purportedly on her aunt's behalf under the authority of a limited power of attorney. 516 B.R. at 101. The debtor's niece moved to waive the personal appearance of the debtor at the meeting of creditors. *Id.* The court ruled that it would deny the motion unless it received supplemental evidence of the debtor's mental competency to have executed the power of attorney for her niece to act on her behalf. 516 B.R. at 105-106. The court found that the evidentiary record was deficient in the case to recognize the power of attorney for the niece to file the bankruptcy case on behalf of her aunt. *Id.* at 105. The court in *Matthews*

followed the decision of its circuit court of appeals, the Fifth Circuit, in *Spurlin* holding that a general power of attorney may be used to file a bankruptcy case on another's behalf. *Id.* at 102 and n. 3 (citing *In re Spurlin,* 664 F.3d at 959). However, the court in *Matthews* also followed the Fifth Circuit's suggestion in *Spurlin* that "there needs to be a failsafe to prevent abuse and that there needs to be some evidence that the debtor was informed and believed that the bankruptcy filing was proper." *Id.* at 102 and n. 4 (internal quotation marks omitted).

Regarding the failsafe to prevent abuse and the need for heightened scrutiny of a bankruptcy case filed for another individual's behalf through use of a power of attorney, the court in *Matthews* stated:

> Here, or in any case where there is use of a power of attorney by one to purportedly act for an individual debtor, this court believes there must be some meaningful scrutiny regarding the facts and circumstances surrounding the power of attorney—especially if it is not a spouse that possesses the power of attorney. This court has concerns about setting precedent or endorsing a protocol that allows a family member (here a niece)—who happens to be living in the Debtor's house with her own daughter—to file a bankruptcy case by proxy for another family member, such that the court, the trustee, and the creditors (to the extent they participate) never see the Debtor, never get to hear the Debtor answer questions under oath, never see the Debtor's signature on crucial documents, and may not be completely convinced of the veracity and integrity of the whole process. This needs to be a "failsafe to prevent abuse." There also needs to be some evidence that the Debtor was informed and believed that the bankruptcy filing was proper.

516 B.R. at 104-105 and n. 12 (citing *In re Spurlin,* 664 F.3d at 960).

Regarding the specific facts presented in *Matthews,* the court observed and stated its concerns:

> The record is deficient in the case at bar. The court heard testimony from the Niece and heard representations from Debtor's counsel at the hearing on the Motion [to waive personal appearance of Debtor at the meeting of creditors]. Still, the court has many questions and concerns. Among other things, the court has posed the question why a person who is elderly and incapacitated, in a nursing home, with apparently no nonexempt assets, might need to file a bankruptcy case. The court has not gotten satisfactory answers. The Debtor has approximately $82,000 of unsecured debt (mostly incurred since her stroke.) Again, the Debtor appears to have no nonexempt assets. The

> court has some concerns that extended family members may have goals here that predominate.

516 B.R. at 105.

The court in *Matthews* further stated its observations that a guardian ad litem appointed by a state probate or family court would provide some measure of protection to prevent abuse in these circumstances:

> Clearly, this would all seem more palatable if there were a guardian ad litem . . . . Why does a guardian ad litem seem more palatable? Here, as mentioned, the court merely has a "Limited Power of Attorney" in the record—that solely purports to give the Niece the power to file and act in a bankruptcy case. The power of attorney situation puts the bankruptcy court in a bit of an awkward situation that probably is better suited for a probate or family court. The court is left wondering whether the Debtor had the requisite mental capacity to appoint an attorney-in-fact at the time of the executive of the Limited Power of Attorney? Where and under what circumstances was it signed? Did the Debtor receive an explanation of its meaning by an attorney prior to its execution? Is the Niece well suited to act as the Debtor's fiduciary? Is the Niece really competent to testify under oath as to all of the Debtor's financial affairs (the court notes that the Niece seemed to have some shaky answers concerning some of the scheduled debt). Presumably, probate or family courts do an exhaustive review of the facts and law before deciding whether to appoint a guardian ad litem to act for another. Hopefully, they have applied the correct standards to determine that it is in the best interests under the circumstances to allow one person to act for another. With a power of attorney, there are less protections. The bankruptcy process contemplates a debtor swearing under oath as to various important facts. How does the bankruptcy court know that the holder of the power of attorney is really the appropriate person to be swearing to important information and, for that matter, worthy of being the debtor's representative? The court has other parties-in-interest to consider here—namely the creditors. Having noted all of this, the court can, if it deems appropriate, appoint a next friend or guardian ad litem pursuant to Bankruptcy Rule 1004.1, where necessary. No such request is pending before the court.

516 B.R. at 105-106.

The court in *Matthews* ruled that the niece's motion to excuse the debtor from appearing at the meeting of creditors and to allow the niece to testify for the debtor at the meeting of creditors should be denied unless a supplement to the motion was filed within 5 days of the ruling. *Id.* at 106. The court then said that such supplemental evidence must include (1) evidence or testimony in the form of an affidavit indicating whether the debtor had the requisite mental capacity to appoint an attorney-in-fact at the time of her

signing the limited power of attorney or when any other power of attorney was signed by her, whether the debtor received an explanation by an attorney prior to the execution of the power(s) of attorney about the meaning of such power(s) of attorney, and generally when and under what circumstances the debtor signed such document(s); (2) a declaration from debtor's counsel regarding what he had done to confirm that the debtor was informed and consented to the bankruptcy filing; and (3) a statement clarifying who signed the bankruptcy paperwork (i.e., the debtor or the niece). *Id*. The court further ruled that it would make a further ruling after the supplement was filed, but if the supplement were not filed within 5 days, the case would be dismissed with prejudice to filing another bankruptcy case for 180 days. *Id.*

Based on case law such as *Ballard, Spurlin*, and *Matthews,* while the court disagrees with the Trustee that a general power of attorney not specifically referring to bankruptcy can be used to file a bankruptcy petition for another, the court determines that there needs to be a failsafe to prevent abuse where a bankruptcy case is filed for another individual through use of a power of attorney and that there needs to be some evidence that the Debtor was informed about the bankruptcy case and consented in order to find the case to be proper. Thus, in this case, even if the court generally agrees with the case law that a general power of attorney may be used to file this bankruptcy case for another individual, the failsafe requirement that the debtor must have been informed about, and consented to, the filing of bankruptcy case must be satisfied.

The evidence here indicates that this failsafe requirement is not met. Mr. Kobayashi did not inform Debtor about the bankruptcy case he filed for her, nor did he ever obtain her consent to file a bankruptcy case for her, as he acknowledged in his statements in court at the hearing on April 16, 2019:

> THE COURT: All right. So when you filed the bankruptcy case did you talk to her about it?
>
> MR. K[O]BAYASHI: I didn't have time. As far as the—
>
> THE COURT: *You never talked to the debtor about the filing of the bankruptcy?*

> MR. K[O]BAYASHI: *I didn't have an opportunity.* The staff on the (indiscernible) said they'll call the police—
>
> THE COURT: Okay. So you didn't have the opportunity to talk to her about—
>
> MR. K[O]BAYASHI: I didn't—
>
> THE COURT: All right.
>
> MR. K[O]BAYASHI: I didn't.
>
> THE COURT: All right. All right. So she doesn't know about this bankruptcy case?
>
> MR. K[O]BAYASHI: I will tell you that she—she has been a housewife.
>
> . . .
>
> MR. K[O]BAYASHI: So she—I know how (indiscernible). She has been a housewife so she—she's not sophisticated person. How (indiscernible) is not sophisticate[d]. She's a very simple-minded person.

Transcript of Proceedings, April 16, 2019, Docket Number 22 at 17-19 (emphasis added). Because the evidentiary record indicates that the failsafe requirement, following *Spurlin* and *Ballard*, has not been met in this case, since Debtor was not informed about the bankruptcy case and has not otherwise ratified the filing of the bankruptcy petition by Mr. Kobayashi, the court determines that it should not recognize this case as properly filed through the use of a power of attorney. *In re Spurlin, supra; In re Ballard, supra; see also In re Eicholz,* 310 B.R. at 205-209.

3. Debtor Lacked Capacity to Sign the Power of Attorney.

The power of attorney that Mrs. Nakano purportedly signed for Mr. Kobayashi to act as her agent and attorney-in-fact contains the statutory language that it would remain effective even after the principal, Mrs. Nakano, became incapacitated, thus indicating that it was a durable power of attorney. However, the validity of the power of attorney depends on a determination whether Mrs. Nakano was mentally competent when she executed the power of attorney on February 10, 2018.

As the court in *In re Sniff* has observed, "Incompetency determinations are not a common exercise of bankruptcy courts. Indeed, the Bankruptcy Code does not define

'incompetency.'" *In re Sniff,* No. 15-18086 TBM, 2015 WL 7351477 (Bankr. D. Colo. 2015), slip op. at *3 (citing, *inter alia, In re Moss,* 239 B.R. 537, 539 (Bankr. W.D. Mo. 1999)). As the court in *In re Sniff* further commented: "In the absence of express statutory authority to determine competency, at least some bankruptcy courts have deferred and required such determinations to be made only in state court. However, most bankruptcy courts willing to delve into the issue have engaged in an assessment under state law." *Id.* (citing, *inter alia, In re Moss,* 239 B.R. at 539 (since there is no federal law on the determination of incompetency, which has been traditionally left to state law, the incompetency laws of the state of the debtor's domicile must be examined for guidance on the matter)).

In this case, California law applies since there is no dispute that Mrs. Nakano resides or is domiciled in California. California Probate Code § 4120 governs legal competency to execute a power of attorney and provides that a "natural person having the capacity to contract may execute a power of attorney." *See also Lintz v. Lintz,* 222 Cal.App.4th 1346 (2014). In *Lintz v. Lintz,* the court described the statutory sliding scale of the contractual standard of mental competency set forth in the California Probate Code §§ 810-812 applicable to certain legal acts and decisions, including formation of contracts, which this court determines applies to the power of attorney executed in this case:

> Probate Code sections 810 to 812 set forth a mental capacity standard related to certain legal acts and decisions. Section 810 establishes a rebuttable presumption "that all persons have the capacity to make decisions and to be responsible for their acts or decisions," recognizing that persons with mental or physical disorders "may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions." (Prob.Code, § 810, subds. (a), (b).) Section 811, subdivision (a) provides that a person lacks capacity when there is a deficit in at least one identified mental function and "a correlation [exists] between the deficit or deficits and the decision or acts in question ...." Section 812 provides: "Except where otherwise provided by law, including, but not limited to, ... the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate ... the decision, and to understand and appreciate, to

> the extent relevant ... : [¶] (a) The rights, duties, and responsibilities created by, or affected by the decision[;] [¶] (b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision[; and] (c) [¶] The significant risks, benefits, and reasonable alternatives involved in the decision." (Prob.Code § 812, subds. (a)-(c).)

Lintz v. Lintz, 222 Cal.App.4th at 1351.

Furthermore, under California Civil Code § 39, contracts and conveyances are subject to rescission (cancellation) if a party was of "unsound mind," which is presumed if he or she was "substantially unable to manage financial resources or resist fraud or undue influence." California Civil Code § 39. However, "isolated acts of negligence or improvidence" are, without more, insufficient to show the party was of "unsound mind." *Id.*

The Trustee argues that the case should be dismissed because Debtor could not have had the mental capacity to sign the power of attorney in February 2018, and therefore Mr. Kobayashi did not have authority to file the bankruptcy case for Debtor in February 2019. In considering the evidence of whether Debtor had or lacked capacity to sign the power of attorney in February 2018, the evidence of her lack of capacity, though circumstantial, is sufficient for the court to doubt that she had the capacity to understand and sign the power of attorney. At the hearing on June 12, 2019, the court heard the testimony of Thomas Mead, administrator of the La Brea Rehabilitation Center, the skilled nursing care facility where Debtor has been living since April 2018. According to Mr. Mead, Debtor has been diagnosed by a physician as having Alzheimer's disease, and based on staff observations, while Debtor can answer simple questions regarding her immediate physical needs—such as if she is tired, hungry, or in pain—she has cases of confusion and cannot make sound decisions. The court finds this testimony to be credible. As Mr. Kobayashi acknowledged in his declaration in opposition to the Motion, Debtor needed him as a caretaker because as "[t]he 86 year old lady debtor has lost her mental and physical strength due to her age," and he attended the meeting of creditors for Debtor on March 14, 2019 because "debtor was on a wheel chair and too weak mentally and physically to attend the meeting." *Debtor and Yuki Kobayashi's Opposition to Trustee's Motion for Dismissal of Case,* Docket Number 15 at 2-3. Moreover, as Mr.

Kobayashi admitted in his opposition to the Trustee's supplemental brief, "Because of her loss of memory, Debtor may not remember now her signing or understanding of the power of attorney." *Debtor's Opposition to Trustee's Supplemental Support for Motion for Dismissal of Case,* Docket Number 28 at 7.

The circumstantial evidence here indicates lack of mental competence of Mrs. Nakano to execute the power of attorney when she signed it on February 10, 2018. Firstly, Mrs. Nakano's mental condition was deteriorating. Mrs. Nakano is elderly, being 86 years old. There is no dispute on this record that her mental condition was deteriorating at the time she executed the power of attorney on February 10, 2018. As Mr. Mead (the administrator at the La Brea Rehabilitation Center, the skilled nursing care facility where Mrs. Nakano has been living since being admitted in April 2018) testified, she is currently diagnosed with Alzheimer's disease, and the staff at the facility has determined that she cannot make sound decisions on her own, including medical decisions. The admission record of the La Brea Rehabilitation Center for Mrs. Nakano on April 6, 2018 indicated that she had already been diagnosed with dementia and was being admitted to the nursing care facility for that reason. As acknowledged by Mr. Kobayashi, he knew that Mrs. Nakano was losing her mental power, which he said in his declarations filed in opposition to the Motion that he wanted her to sign the power of attorney before she completely lost her mental power. He said in one of his declarations that Mrs. Nakano "has lost her mental and physical strength due to her age" and "[o]bviously, she needed to live in a nursing home." *Declaration of Yuki Kobayashi* attached to *Debtor and Yuki Kobayashi's Opposition to Trustee's Motion for Dismissal of Case,* Docket Number 15 at 2-3. He also recognized that "debtor Nakano may have a memory-loss disorder." *Declaration of Yuki Kobayashi* attached to *Debtor's Opposition to Trustee's Supplemental Support for Motion for Dismissal of Case,* Docket Number 28 at 6. These observations further evidence Mrs. Nakano's mental impairment at the time she purportedly executed the power of attorney.

The court finds that there is strong circumstantial evidence that Mrs. Nakano was not mentally competent when she executed the power of attorney to Mr. Kobayashi on February 10, 2018, including at least the following: Mrs. Nakano's advanced age of 86, her medical diagnosis of Alzheimer's disease from Mr. Mead's testimony, the admission record with a diagnosis of dementia in early April 2018, the observations of mental decline by Mr. Kobayashi, and Mrs. Nakano's multiple falls between January 2018 and April 2018. Mr. Kobayashi is not a medical professional and was self-interested because the power of attorney benefitted him personally, and the court does not give much weight to his opinion that Mrs. Nakano had the mental capacity to execute the power of attorney in February 2018, and thus the court determines that his opinion does not rebut the circumstantial evidence of her lack of mental capacity.

Secondly, Mrs. Nakano was and is physically debilitated. She was hospitalized after falling. After one fall, she broke her hip, and since her hip was broken, she has been under full time supervised medical care either in a hospital or a skilled nursing care facility since April 2018 as a result of her injuries from her falls and her mental impairment. As stated by the administrator of her care facility, Mrs. Nakano's primary diagnosis is "failure to thrive." She was in a nursing care facility because she could not take care of herself. As the Trustee learned from the notary public who notarized the power of attorney, the power of attorney was notarized not in Mrs. Nakano's apartment, but at 124 South Hoover Street, Los Angeles, California, which is not her apartment, and apparently, as the Trustee stated, one of the nursing homes where Debtor was being cared for at the time. As the Trustee observed on her visit with Mrs. Nakano in May 2019, she is very frail. Mr. Kobayashi acknowledged her physical infirmities by stating that he only became her caretaker because she could not take care of herself on her own, and this was before she signed the power of attorney in February 2018. Indeed, based on Mr. Kobayashi's testimony, while he was taking care of her, she became incapable of caring for herself, and in his words, she would have died of hunger without a caretaker. The court can

reasonably infer that Mrs. Nakano's injuries from falls contributed to her physical and mental decline, especially in light of her advanced age.

Other circumstances surrounding the execution of the power of attorney by Mrs. Nakano indicate lack of competency or lack of comprehension or voluntariness on her part. *See In re Matthews,* 516 B.R. at 105-106 (posing questions regarding the circumstances of execution of a power of attorney by an elderly and incapacitated person). Mrs. Nakano was socially isolated. She is an elderly woman, 86 years old, and was alone and living by herself for about three years after her husband of many years passed away. She is an immigrant from Japan and has no relatives. When she became unable to care for herself due to physical and mental impairment, she did not have family support to help her. As Mr. Kobayashi described Mrs. Nakano, she is not a "sophisticated" person, but a very "simple-minded" person. Mrs. Nakano is not a native English speaker, and Japanese is her native language. Her English language comprehension by all accounts is very limited, and thus it is unlikely that she could have read and understood on her own the Uniform Statutory Form Power of Attorney written in English, which Mr. Kobayashi prepared for her, and it is unlikely that she could have understood the complex legal concepts of the various powers set forth in the Uniform Statutory Form Power of Attorney on her own without the assistance and guidance of an attorney at law, which she did not have. That is, there is no evidence that she executed the power of attorney after being assisted and guided by a licensed attorney. Thus, she was dependent on a complete and accurate translation of the Uniform Statutory Form Power of Attorney in the Japanese language and the assistance and guidance of an attorney translated into Japanese in order for her to have fully understood the legal consequences of the Uniform Statutory Form Power of Attorney that Mr. Kobayashi prepared for her to execute.

There is insufficient evidence in the record that Mr. Kobayashi completely and accurately translated for, and explained to, Mrs. Nakano in Japanese the Uniform Statutory Form Power of Attorney that he filled out for her. In his declarations, Mr.

Kobayashi does not describe what he actually told or explained to Mrs. Nakano about the power of attorney with any specificity. The court notes that Mr. Kobayashi offered no evidence of any written translation into Japanese of the Uniform Statutory Power of Attorney that Mrs. Nakano executed. Mrs. Nakano executed the power of attorney document in English, a language that is not her native language and of which her understanding is limited. Thus, Mrs. Nakano's understanding of the Uniform Statutory Power of Attorney was dependent on whatever Mr. Kobayashi explained to her. This situation presents several serious problems. First, Mr. Kobayashi was not a disinterested party in explaining the document to Mrs. Nakano because he benefits from the execution of the power of attorney, which is shown on its face to give him personal rights to enter, use, and live in her rent controlled apartment for 10 years, which survives her death, and, as shown by her bankruptcy schedules, he is allocating $300 per month for himself as her caretaker as her monthly expense deducted from her monthly social security benefit income of $966. Moreover, the Uniform Statutory Form Power of Attorney prepared by Mr. Kobayashi for Mrs. Nakano purports to provide Mr. Kobayashi all the powers to control Mrs. Nakano's assets and financial affairs, and he is only accountable to her, but she is inhibited in her oversight given her mental and physical infirmities.

Second, the evidence that Mr. Kobayashi completely and accurately translated and explained the power of attorney to Mrs. Nakano solely consists of his self-serving and conclusory statements in his declarations that he had done so:

> I explained to her what was a power of attorney and that it had to be signed before a notary public. I explained these in Japanese and she understood or appeared to understand them. I thought it was better for her to execute a power of attorney before she completely lost mental power. So, I told Debtor that I would bring a notary public in a few days. I chose an experienced notary public, rather than a young one, so that everything would be done properly. One day, I brought a notary public and while he was watching, Debtor signed a power of attorney. I witnessed it and the notary also witnessed it. I had no doubt about Debtor's understanding of the power of attorney. Also, if the notary had any doubt about Debtor's understanding, he would not have notarized the document. Because of her loss of memory, Debtor may not remember now her signing or understanding of the power of attorney. But, this does not and should not mean that Debtor was

> totally without understanding of the power of attorney at the time of her execution. In fact, at that time Debtor was much stronger and able to walk without a wheel-chair, but now she is bound to a wheel-chair.

Declaration of Yuki Kobayashi attached to *Debtor's Opposition to Trustee's Supplemental Support for Motion for Dismissal of Case,* Docket Number 28 at 6-7. Nothing in these statements by Mr. Kobayashi shows what he actually explained to Mrs. Nakano or translated for her about the meaning and legal consequences of the power of attorney, including each and every power that she would be giving to him over her assets and financial affairs, before she executed it. Mr. Kobayashi's statements that he explained to Mrs. Nakano what the power of attorney was, that it had to be signed before a notary in Japanese, and that "she understood or appeared to understand them" do not establish that she understood what the power of attorney was because there is no meaningful information as to what he explained to her, whether it was translated, the duration of time he took to explain it to her, or over what period of time. Moreover, the fact that the notary public notarized the power of attorney does not establish that Mrs. Nakano understood it. Neither Mr. Kobayashi nor the notary public is shown to be a medical professional who could competently give an opinion on Mrs. Nakano's mental capacity. The circumstance of the location where Mrs. Nakano executed the power of attorney shows duress or lack of voluntariness because it was not at her apartment but, as discussed earlier, at another location, one of the nursing homes where she was being cared for after an injury. Thus, the evidence indicates that Mr. Kobayashi brought the power of attorney for Mrs. Nakano with the notary public in tow over to the nursing home where she was apparently recovering from one of her injuries during a patient visit. There was no licensed attorney-at-law present to provide assistance or guidance to Mrs. Nakano regarding the meaning and legal consequences of the power of attorney. There were no other witnesses to the execution of the power of attorney other than Mr. Kobayashi and the notary. .The court cannot say with any confidence that Mr. Kobayashi accurately and completely explained the power of attorney to Mrs. Nakano at any time because the evidence that he did so is inadequate. The totality of these circumstances indicates the vulnerability of Mrs. Nakano

to suggestion, undue influence, and if not, coercion with respect to the execution of the power of attorney and the likelihood that she did not understand what she was signing when she executed the power of attorney.

Mr. Kobayashi contended on the record of the hearing on June 12, 2019 that Mrs. Nakano may have been mentally competent to sign the power of attorney in February 2018. But the evidence as a whole, including the testimony of Mr. Mead and Mr. Kobayashi's own statements, indicates that, as of February 2019, Mrs. Nakano was not mentally competent to file a bankruptcy case after being a long-term resident of a skilled nursing care facility starting in April 2018 with a diagnosis of Alzheimer's disease, where the nursing staff observed that Debtor had instances of confusion and could not make sound decisions.

Under California Probate Code § 811, mental incapacity to make a decision or do a certain act, such as contract or make medical decisions, must be supported by evidence of a mental function deficit, of a correlation between such mental function deficit and the decision or act, and that such deficit "significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question." California Probate Code § 811. The evidence here shows that Mrs. Nakano did not have the mental capacity to validly execute the power of attorney in February 2018. As of February 2018, Mrs. Nakano suffered mental function deficits in information processing, including short-term and long-term memory loss and ability to plan, organize, and carry out actions in her own rational self-interest. There was a correlation between these deficits and the execution of the power of attorney. These deficits significantly impaired Mrs. Nakano's ability to understand and appreciate the consequences of her actions when she executed the power of attorney, as indicated by the evidence of her mental and physical decline and incapacity in the admission record of La Brea Rehabilitation Center on April 6, 2018. The admission record indicates an existing diagnosis of dementia and a later diagnosis of Alzheimer's disease by the center's medical staff, an evaluation of the staff that she has "cases of confusion" and cannot

make sound medical and financial decisions, and the Trustee's observations in her declaration that Mrs. Nakano could not remember her age and other details of her early life. Even Mr. Kobayashi's observations in his declarations show Mrs. Nakano's limited mental capacity: that she is an "86 year old lady debtor [who] has lost her mental and physical strength due to her age," "she could not pay rent and utility bills, she could not check her mails each day and timely respond to important mails, etc.," "[o]bviously, she needed to live in a nursing home," "the debtor needed a caretaker who could go shopping for foods, cook meals, pay rent and utility bills, and live in her apartment so that she could be taken care of day and night, 7 days a week," and "debtor Nakano may have a memory-loss disorder."

While some of the evidence is based on observations of Debtor's mental impairment after the execution of the power of attorney in February 2018, the court can and does infer that the duration and severity of her mental impairment show that such impairment was significant and affected her ability to understand and appreciate the consequences of her action in executing the power of attorney. Mrs. Nakano had already been diagnosed with dementia when she was admitted to a skilled nursing care facility, the La Brea Rehabilitation Center, on April 6, 2018, less than 2 months after she executed the power of attorney on February 10, 2018. Subsequently, as of June 2019, she had been diagnosed with Alzheimer's disease, and staff at the La Brea Rehabilitation Center determined that she was unable to make sound medical and financial decisions and that an interdisciplinary medical team would have to make medical decisions for her. As indicated by the observations of Mr. Kobayashi, he became her caretaker and roommate for the 10 months before she was hospitalized for injuries in January 2018, after he noticed she could not take care of herself because she was neglecting to pay her essential expenses, including rent and utilities, and to read her mail, and he had observed her mental and physical decline, so he felt he needed to get her to execute a power of attorney before she was completely incapacitated. According to Mr. Kobayashi, by the time she executed the power of attorney, she was unable to care for herself due to her

declining mental and physical conditions due to age. Based on this evidence, the court finds that the mental incapacity of Mrs. Nakano to execute the power of attorney in February 2018 is supported by the preponderance of the evidence of her mental function deficits in information processing, of a correlation between such deficits and her execution of the power of attorney, and of a significant impairment of her ability to understand and appreciate the consequences of her actions with regard to her execution of the power of attorney from such deficits for purposes of California Probate Code § 811. In so finding that the evidence satisfies the requirements of a claim under California Probate Code § 811, the court also finds that the rebuttable presumption of California Probate Code § 810 "that all persons have the capacity to make decisions and to be responsible for their acts or decisions" is sufficiently rebutted.

Under California Probate Code § 812, mental incapacity to make a decision may be demonstrated where the subject was unable to communicate regarding the decision at issue, or alternatively, that the subject was unable to understand and appreciate: (1) the rights, duties and responsibilities created or affected by the decision; (2) the probable consequences for affected persons; or (3) the risks, benefits and alternatives. The evidence shows that Mrs. Nakano was unable to understand and appreciate the rights, duties, and responsibilities created or affected by her execution of the power of attorney, the probable consequences for affected persons, such as herself and her creditors, and the risks, benefits, and alternatives of her execution of the power of attorney as of February 2018. The evidence clearly shows her mental and physical decline and incapacity in the admission record of La Brea Rehabilitation Center on April 6, 2018 indicating an existing diagnosis of dementia, the later diagnosis of Alzheimer's disease by medical staff at the La Brea Rehabilitation Center and evaluation of the staff that she had "cases of confusion" and could not make sound medical and financial decisions, the Trustee's observations of Mrs. Nakano in her declaration that she could not remember her age and other details of her early life, and Mr. Kobayashi's observations in his declarations that she is an "86 year old lady debtor [who] has lost her mental and physical

strength due to her age," "she could not pay rent and utility bills, she could not check her mails each day and timely respond to important mails, etc.," "[o]bviously, she needed to live in a nursing home," "the debtor needed a caretaker who could go shopping for foods, cook meals, pay rent and utility bills, and live in her apartment so that she could be taken care of day and night, 7 days a week," and "debtor Nakano may have a memory-loss disorder."

As for the analysis under California Probate Code § 811, in analyzing the evidence under California Probate Code § 812, the court observes that while some of the evidence is based on observations of Debtor's mental impairment after the execution of the power of attorney in February 2018, the court can and does infer that the duration and severity of her mental impairment show that, when she executed the power of attorney, she was unable to understand and appreciate: (1) the rights, duties and responsibilities created or affected by her decision to execute the power of attorney; (2) the probable consequences for persons affected by this decision, including herself and her creditors; or (3) the risks, benefits and alternatives to execution of the power of attorney. Mrs. Nakano had already been diagnosed with dementia when she was admitted to a skilled nursing care facility, the La Brea Rehabilitation Center, on April 6, 2018, less than 2 months after she executed the power of attorney on February 10, 2018. Subsequently, as of June 2019, she had been diagnosed with Alzheimer's disease, and staff at the La Brea Rehabilitation Center determined that she was unable to make sound medical and financial decisions and that an interdisciplinary medical team would have to make medical decisions for her. As indicated by the observations of Mr. Kobayashi, he became her caretaker and roommate for the 10 months before she was hospitalized for injuries in January 2018, after he noticed she could not take care of herself because she was neglecting to pay her essential expenses, including rent and utilities, and to read her mail, and he had observed her mental and physical decline, so he felt he needed to get her to execute a power of attorney before she was completely incapacitated. According to Mr. Kobayashi, by the time she executed the power of attorney, she was unable to care for herself due to her

declining mental and physical conditions due to age. Based on this evidence, the court finds that the mental incapacity of Mrs. Nakano to execute the power of attorney in February 2018 is supported by the preponderance of the evidence that that she was unable to understand and appreciate: (1) the rights, duties and responsibilities created or affected by her decision to execute the power of attorney in February 2018; (2) the probable consequences for affected persons, including herself and her creditors; and (3) the risks, benefits and alternatives to her decision to execute the power of attorney for purposes of California Probate Code § 812. In so finding that the evidence satisfies the requirements of a claim under California Probate Code § 812, the court also finds that the rebuttable presumption of California Probate Code §810 "that all persons have the capacity to make decisions and to be responsible for their acts or decisions" is sufficiently rebutted.

As stated earlier, under California Civil Code § 39, contracts are subject to rescission if a party was of "unsound mind," which is presumed if he or she was "substantially unable to manage financial resources or resist fraud or undue influence." California Civil Code § 39. The evidence shows that Mrs. Nakano was of "unsound mind" as of February 2018 when she executed the power of attorney. This is presumed because, by that time, she was "substantially unable to manage her financial resources or resist fraud or undue influence." This is indicated by the evidence of her mental and physical decline and incapacity in the admission record of La Brea Rehabilitation Center on April 6, 2018. This is further indicated by an existing diagnosis of dementia, the later diagnosis of Alzheimer's disease by medical staff at the La Brea Rehabilitation Center, evaluation of the staff that she had "cases of confusion" and could not make sound medical and financial decisions, the Trustee's observations in her declaration of Mrs. Nakano that she could not remember her age and other details of her early life, and Mr. Kobayashi's observations in his declarations that she is an "86 year old lady debtor [who] has lost her mental and physical strength due to her age," "she could not pay rent and utility bills, she could not check her mails each day and timely respond to important mails,

etc.," "[o]bviously, she needed to live in a nursing home," "the debtor needed a caretaker who could go shopping for foods, cook meals, pay rent and utility bills, and live in her apartment so that she could be taken care of day and night, 7 days a week," and "debtor Nakano may have a memory-loss disorder."[6]

Specifically, as to Mrs. Nakano being substantially unable to resist undue influence, as discussed above, the evidence indicates that she was in both physical and mental decline suffering from both physical injuries and dementia at the time that Mr. Kobayashi brought the power of attorney and the notary public to her while she was recovering in a nursing care facility, and she was unable to care for herself due to these conditions. Furthermore, the evidence indicates that Mrs. Nakano's English language comprehension ability is very limited, and that even though the power of attorney was written in English., she could not meaningfully understand this document unless it was completely and accurately translated to her in Japanese. The evidence is inadequate to demonstrate that the power of attorney was so completely and accurately translated, and the person who would have done the translation and explanation of the document was Mr. Kobayashi, who was self-interested since he benefitted personally from the execution of the document. There was no attorney to explain the meaning and legal consequences of execution of the power of attorney to Mrs. Nakano. The totality of the evidence demonstrates that Mrs. Nakano was "substantially unable to manage financial resources or to resist fraud or undue influence" as of February 2018 when she executed the power of attorney. Therefore, the evidence supports the presumption that she was of unsound mind when she executed the document, which presumption is not rebutted here.

California Civil Code § 39 also provides that "isolated acts of negligence or improvidence" are, without more, insufficient to show the party was of "unsound mind." Here, however, this is not the case because the evidence indicates that Debtor's mental and physical infirmities were over a long period of time starting months before she

[6] Most of these observations of Mr. Kobayashi came from the 10-month period during which he was her caretaker and roommate in her apartment before she was hospitalized in January 2018.

executed the power of attorney in February 2018 as indicated by Mr. Kobayashi's statements in his declarations about her decline in mental and physical powers which prompted him to act as her caretaker, which he said was at least 10 months before she was hospitalized in January 2018 for her injuries, and such infirmities have existed through the present time in June 2019. Accordingly, the court finds by a preponderance of the evidence that there is a factual basis to rescind the power of attorney pursuant to California Civil Code § 39 because Debtor was of unsound mind when she executed it in February 2018.

4. There is No Legitimate Purpose for This Bankruptcy Case.

With respect to the Trustee's precise argument in the Motion to Dismiss that there is no legitimate purpose to the bankruptcy case because Debtor's schedules demonstrate that she has more cash than debts and is solvent, the court does not find this particular argument to be persuasive. As Trustee admitted in her reply papers and at the hearing on June 12, 2019, she made a mistake and misread the bankruptcy schedules by asserting that Debtor had more cash than debts, which is not reflected on the schedules which show scheduled debts of $19,443.52, cash and money deposits of $14,405.36, and an emergency fund of $4,900.00 in "safekeeping by my agent" (i.e., Kobayashi). *Bankruptcy Schedules*, Docket Number 9 at 7 and 10.[7] Debtor does not have more cash than debts. The schedules show assets of $200,035.36, but much of that amount is in potential claims of $150,000.00 for a wrongful eviction claim against the landlord and his attorneys and a claim of $20,000.00 against a bank for refusal to honor the power of attorney, which are claims that may not be liquidated. *See Bankruptcy Schedules*, Docket Number 9 at 10. As Kobayashi stated at the hearing on June 12, 2019, there may well have been calls and

[7] Mr. Kobayashi argues that the Trustee committed perjury when she made this statement in her declaration under penalty of perjury that Debtor's bankruptcy schedules showed more cash than debts. This is not perjury because the evidence does not indicate that the Trustee willfully subscribed to the statement in her declaration stating that it was true when she believed that it was not true. 18 U.S.C. § 1621(2). The evidence, including the Trustee's reply to the opposition to the motion, shows that she believed the statement to be true when she made it, but promptly acknowledged that she was mistaken in making the statement because she misread the schedules after Mr. Kobayashi pointed out her mistake in his opposition.

letters from creditors to Debtor demanding payment of debts. Thus, it is difficult to say that these circumstances could not have possibly been at some time a proper reason for filing a bankruptcy case for Debtor.

However, the current circumstances of Mrs. Nakano, based on this record, indicate that the Trustee has the better argument that there is no legitimate purpose for this bankruptcy case over Mr. Kobayashi's claim that there is a legitimate purpose for this case. In this regard, this case presents the same questions that were raised by the court in *In re Matthews,* including, "why a person who is elderly and incapacitated, in a nursing home, with apparently no nonexempt assets, might need to file a bankruptcy case." *In re Matthews,* 516 B.R. at 105. Like the court in *Matthews,* the court has some concerns that a party other than Debtor "may have goals here that predominate." *Id.*

The potential for abuse is present here because Mr. Kobayashi is not a relative of Debtor and only, as he acknowledges, an acquaintance of Debtor, and the evidence indicates that he was attempting to have Debtor sign documents in December 2018 at the care facility where Debtor was living—over the objection of the professional nursing staff who determined that Debtor was not in a position to make sound decisions.

Mr. Kobayashi, in his declaration in his opposition to the Motion, to refute the Trustee's assertion that "debtor's interest are (sic) not being served," contended:

> If it should be a case, then whose interests are being served? Trustee fails to answer this question. If trustee wants to claim that my interests are being served, then trustee must explain how my interests are being served. Trustee totally fails to demonstrate any specific interest being serviced and whose interest it is. It is obvious that only debtor's interests are being served by this bankruptcy hoping to preserve debtor's small life-time saving of approximately $14,000 in a bank account, which is a saving of social security benefits of the debtor and her husband and, thus, is exempt. The debtor will have another benefit of getting rid of a bunch of constant, annoying and harassing phone calls and mails from dozens of creditors and collection agencies.

Declaration of Yuki Kobayashi attached to *Debtor and Yuki Kobayashi's Opposition to Trustee's Motion for Dismissal of Case,* Docket Number 15 at 4.

One reason that the court should not recognize the bankruptcy petition is that Debtor is not benefitting from the bankruptcy case. The evidence indicates that she is now suffering from dementia, was diagnosed with Alzheimer's disease, and is under full-time medical care at a skilled nursing care facility because she cannot make sound medical or financial decisions for herself and otherwise cannot take care of herself. Her medical care is being provided for by Medicare and Medi-Cal, and she does not need an outside caretaker such as Mr. Kobayashi to assist her with her medical or personal needs or to handle her assets or finances without court supervision. As suggested by the court in *In re Matthews,* "[a]mong other things, this court has posed the question of why a person who is elderly and incapacitated, in a nursing home, with apparently no nonexempt assets, might need to file a bankruptcy case. The court has not gotten satisfactory answers." 516 B.R. at 105. Likewise, the evidence in this case indicates that there are no satisfactory answers to the question posed by the court in *In re Matthews.*

The record in this case supports the Trustee's assertion that Debtor's interest is not being served, but instead the case serves only Mr. Kobayashi's interest. With the durable power of attorney for Mrs. Nakano, Mr. Kobayashi, who is not a relative but an acquaintance, and who claims to be her "roommate" or "caretaker," has absolutely unfettered and unsupervised control over her financial assets and affairs, and her financial assets are not insubstantial, cash and bank deposits of over $14,000, and a steady income stream of social security benefits of $966 per month from her and her deceased husband's accounts. Mr. Kobayashi and his use of the durable power of attorney are not under any court supervision, as they would be under a conservatorship supervised by a California Superior Court under California law, and are accountable to his conscience alone since there is no dispute that Mrs. Nakano is mentally impaired and cannot make decisions on her own, having been diagnosed with Alzheimer's disease. To the extent that Mrs. Nakano's banks have recognized Mr. Kobayashi's power of attorney and allowed him access to her funds, he says that he is holding on to these funds for "safe keeping." However, Mr. Kobayashi is allocating $300 per month for himself as a "caretaker," about

30% of Mrs. Nakano's only income from social security, as a regular monthly expense of Debtor as indicated on her expense schedule, Schedule J, that he filled out and filed for her as part of her bankruptcy petition. Based on broad powers set forth in the power of attorney over Mrs. Nakano's tangible personal property transactions, her personal and family maintenance and her social security benefits, Mr. Kobayashi has the power to set his compensation as "caretaker," and he is not limited to the $300 per month that he now admits that he is allocating for himself. There has been no showing that this amount is reasonable because Mr. Kobayashi has not been actually taking care of Mrs. Nakano since January 2018, when she was admitted to skilled nursing care facilities, first, Alden Care, and now, La Brea Rehabilitation Center. The nursing staff at these facilities where she resided have been and are taking care of Mrs. Nakano.[8]

The filing of the bankruptcy case by Mr. Kobayashi for Mrs. Nakano would advance his interests by accomplishing the following objectives: (1) the assets claimed as exempt unless the claimed exemptions were objected to would be immune from being used to pay her creditors since exempt property is not used to pay creditors of the bankruptcy estate; and (2) Mrs. Nakano as a Chapter 7 bankruptcy debtor would receive a discharge of her dischargeable debts owed to her creditors. Through Mrs. Nakano's bankruptcy case, her primary assets, including her cash and bank deposits and social security savings and income, which are claimed as exempt by Mr. Kobayashi, would be insulated from creditor claims. Based on Mr. Kobayashi's claim of authority under the durable power of attorney for Mrs. Nakano, his total and unsupervised control of her assets would be free of any claims of her creditors. Moreover, there is no good faith intent to pay the claims of creditors in the bankruptcy petition filed by Mr. Kobayashi for Mrs. Nakano because he indicated all of the scheduled claims of creditors were disputed, if not also unliquidated and/or contingent. *See In re Matthews,* 516 B.R. at 106 (observing that "[t]he court has

[8] Furthermore, according to Mr. Kobayashi's own statements on the record of the hearing on April 16, 2019, he has been unable to even see Mrs. Nakano because the nursing care staff at La Brea Rehabilitation Center informs law enforcement as soon as Mr. Kobayashi arrives on the premises.

other parties-in-interest to consider here—namely the creditors"). Similarly, the court here finds that the interests of creditors would not be served by this bankruptcy case because Debtor's only assets are claimed as exempt on Schedule C, so these assets could not go to creditors in a Chapter 7 liquidation. Thus, the court also agrees with the Trustee that the bankruptcy case is not in the interest of creditors because there is no good faith intent to pay claims of creditors as all of the meaningful assets of the estate (i.e., liquid assets, such as cash, bank deposits, and social security benefits) are being claimed as exempt, and all of the claims of creditors are scheduled as disputed.

There is no indication in the evidentiary record that Mr. Kobayashi has used or will use Mrs. Nakano's assets and income for her benefit because he has not shown that he has used any of these assets for her care or benefit, other than holding them in "safe keeping" for future expenses after payment of his "caretaker" fees. Mr. Kobayashi says that he is holding on to Mrs. Nakano's assets for funeral expenses or if she wants to move back to Japan for living expenses. Mr. Kobayashi says that he is responsible to Mrs. Nakano as a fiduciary, but there is no one to hold him to account regarding his control over her assets and income because she is mentally incapacitated. Thus, there is no demonstrated assurance that the funds he is controlling for her will be used for such purposes since it is not likely, given her declining current mental and physical abilities, that she will ever leave full-time nursing care here in Los Angeles to move to Japan, or that he will use the funds for her funeral expenses when they are needed for that purpose.

Currently, Mrs. Nakano's care is being covered by Medicare and Medi-Cal, as explained by Mr. Mead, the administrator of the skilled nursing care facility in which she now lives, in his testimony during the hearing on June 12, 2019, and as reflected on the admission record for her at the facility. Mr. Kobayashi's opposition to the Motion to Dismiss is based on the apparent premise that he is the only one who can be Mrs. Nakano's caretaker regarding her financial affairs. Such a premise would be faulty because Mrs. Nakano's assets and financial affairs can be supervised by a public agency, the Los Angeles Public Guardian within the Department of Mental Health of the County of

Los Angeles, which office provides conservatorship services for older adults, particularly those without family and friends able and willing to help. Los Angeles Public Guardian webpage, https://dmh.lacounty.gov/our-services/public-guardian/ (accessed on June 22, 2019).

Mr. Kobayashi's administration of Mrs. Nakano's personal property assets, including about $15,000 in cash and bank deposits, and her income stream from almost $1,000 a month from social security benefits, lacks accountability and procedural safeguards that would exist under a California conservatorship supervised by a California Superior Court. California Probate Code §§ 1800 et seq. and 2200; *see also* 15 Witkin, *California Summary of California Law,* Wills, § 993 (11th ed. Online edition 2018). A conservator may be appointed for a person who is "unable to provide properly for his or her personal needs for physical health, food, clothing or shelter" or for a person who is "substantially unable to manage his or own financial resources or resist fraud or undue influence." California Probate Code § 1801(a) and (b). There are numerous safeguards to protect the conservatee, including ones against self-dealing by the conservator or fiduciary. *Id.* There are statutory preferences for appointment as a conservator: (1) spouse or domestic partner, or someone nominated by such person; (2) an adult child or a person nominated by the child; (3) a parent or someone nominated by the parent; (4) a brother or sister or someone nominated by the brother or sister; or (5) any other person or entity eligible for appointment under the Probate Code or, if such person or entity is unwilling to act, then one eligible for appointment under the Welfare & Institutions Code. California Probate Code § 1812.

When considering a petition for conservatorship, the court must appoint a court investigator to conduct an investigation, prepare a report, and personally interview the proposed conservatee, the petitioners and all proposed conservators who are not petitioners, the spouse and registered domestic partner of the proposed conservatee, relatives of the proposed conservatee within the first degree, and if the proposed conservatee does not have a spouse, the registered domestic partner or relatives of the

first degree, relatives of the second degree, neighbors and known close friends. California Probate Code § 1826; *see also* 15 Witkin, *California Summary of California Law,* Wills, § 1003. The court investigator must inform the proposed conservatee of his or her procedural rights; determine if the proposed conservatee is able and willing to attend the hearing on the conservatorship proceeding; review the allegations of the conservatorship proceeding; determine whether the proposed conservatee wishes to contest the establishment of the conservatorship and whether the proposed conservatee objects to the proposed conservator or prefers another person to act; determine if the proposed conservatee wishes to be represented by legal counsel, and if so, whether counsel has been retained, or if not, the name of the attorney that he or she wishes to retain; and determine if the proposed conservatee desires the appointment of legal counsel, and whether such appointment would be helpful to resolving the petition or necessary to protect the interests of the proposed conservatee. California Probate Code § 1826. Generally, the proposed conservatee must be present at the hearing before the court on a petition to establish a conservatorship. California Probate Code § 1825(a).

Before a conservatorship is ordered, the court must inform the proposed conservatee of the nature and purpose of the proceeding, the identity of the proposed conservator, the effect on the basic rights of an order for conservatorship relating to the conservatee's legal capacity, the right to oppose the conservatorship proceeding, the right to trial by jury, and the right to legal counsel. California Probate Code § 1828(a). The court must also consult with the proposed conservatee to determine his or her opinion regarding the establishment of a conservatorship and the appointment of the proposed conservator. *Id.* Once established, a conservatorship is subject to periodic court review—(1) first, an initial review after six months whereby the court investigator must visit the conservatee, conduct an investigation and report to the court, and the court may take appropriate action, including further review and ordering an accounting by the conservator, California Probate Code § 1850(a)(1); and (2) thereafter, at either annual or

biannual intervals with further investigation and report by the court investigator, California Probate Code § 1850(a)(2).

The court on its own motion or request of any interested person may take appropriate action, including ordering a review of the conservatorship with a noticed hearing and order the conservator to present an accounting. California Probate Code § 1850(b). Court approval is required for any business transactions in which the conservator has financial interest, and any sale, lease, or rental of estate property must be disclosed to, and approved by, the court. California Probate Code §§ 2351, 2359, 2401, and 2403. The conservator of the estate of a person who supervises the assets and financial affairs of a conservatee is required to make periodic accountings of the conservatorship and is required to submit original account statements of financial institutions in which money and other assets are held or deposited showing the account balances of the accounts as of the closing date of the accounting period, original escrow statements for any sale of real property, and original billing statements for residential care or long-term care facility if the conservatee is a resident. California Probate Code § 2620. With respect to Mr. Kobayashi's administration of Mrs. Nakano's assets and financial affairs, there are no such procedural safeguards to protect her interests from his self-dealing because he is accountable to no one, but Mrs. Nakano is now mentally and physically incapacitated.

Mr. Kobayashi is not suitable as Mrs. Nakano's representative because not only is he not accountable to anyone, but he displays a lack of temperament as shown by his being upset that the Trustee challenged his authority based on the power of attorney by stating in his supplemental opposition: "I honestly hope that evil, perjurer trustee will be abused by people when she gets older so that she will regret her malicious abuse of elder, disabled woman Debtor. I also believe that if there is a god in this world, evil, perjurer trustee should be the first one to be punished." *Declaration of Yuki Kobayashi* attached to *Debtor's Opposition to Trustee's Supplemental Support for Motion for Dismissal of Case,* Docket Number 28 at 5. Mr. Kobayashi's going on the record in this case as hoping that

the "god in this world" punish the Trustee by subjecting her to elder abuse for just doing her job in performing her statutory duties in administering this bankruptcy case under the Bankruptcy Code seems cruel and vindictive. While Mr. Kobayashi takes offense at what he calls racial slurs when the Trustee referred to him as "disheveled" and "shifty," he is quite liberal in dispensing racial and other epithets himself by referring to the Trustee as "old, white female trustee Carolyn A. Dye," "shifty and dishonest trustee Carolyn A. Dye," "perjurer Trustee," and "evil, perjurer trustee". *Declaration of Yuki Kobayashi* attached to *Debtor's Opposition to Trustee's Supplemental Support for Motion for Dismissal of Case,* Docket Number 28 at 3, 4, 5, and 10. In addition, Mr. Kobayashi declared under penalty of perjury that "I have never been ordered by court as a vexatious litigant" and "I have never been a vexatious litigant and I have never filed any frivolous litigation," yet his name appears in both forms on the Vexatious Litigant List of the California courts: Yuki Kobayashi, Los Angeles Superior Court, Case No. BC170895, Date: 11/17/00, and Yukoh Kobayashi, Los Angeles Superior Court, Case No. C698162, Date: 10/21/92 (Limited to a specific case). Vexatious Litigant List from Prefiling Orders Received from California Courts Prepared and Maintained by the Judicial Council of California (Orders prohibiting future filings entered through May 1, 2019), https://www.courts.ca.gov/documents/vexlit.pdf (accessed on June 24, 2019); *see also* Federal Rule of Evidence 201 (the court takes judicial notice of list of vexatious litigants posted on the official website of the California state courts).

III. CONCLUSION

For the foregoing reasons, the court finds that the bankruptcy case was improperly filed for Mrs. Nakano by Mr. Kobayashi based on the lack of information to her about the filing of the bankruptcy case, lack of her consent to the filing of the bankruptcy case, and the lack of authority to file this bankruptcy case for her due to her mental incapacity, her incompetence to execute the power of attorney upon which the bankruptcy case filing was based, and Mr. Kobayashi's failure to inform her about or obtain or even seek her consent

to the bankruptcy case filing. The court finds that notice of the Motion to Dismiss was proper under Federal Rules of Bankruptcy Procedure 2002(a)(4), 9013, and 9014.

Accordingly, the bankruptcy case should be dismissed pursuant to 11 U.S.C. § 521(i)(2) or in the alternative, if 11 U.S.C. § 521(i)(2) is inapplicable, for cause pursuant to 11 U.S.C. § 707(a). The court will grant Trustee's Motion to Dismiss and will enter a separate final order currently herewith consistent with this Memorandum Decision. Because this case was filed without a proper showing of authority to file, to avoid prejudice to creditors of the bankruptcy estate who have been impeded by the automatic stay arising in this case, the court dismisses the case with a prohibition or bar on filing a new bankruptcy case on behalf of Debtor, Mrs. Nakano, for 180 days from the date of entry of the order dismissing this case pursuant to 11 U.S.C. § 105(a). *See In re Matthews,* 516 B.R. at 106. However, the court will deny the Trustee's request for an order directing Mr. Kobayashi to turn over Debtor's original social security card and California identification card to her so that these documents can be placed in Debtor's medical file at the La Brea Rehabilitation Center since the case is being dismissed, the Trustee will be no longer administering the case and the estate.

Given the concerns raised in the moving and opposing papers and in this Memorandum Decision about elder abuse regarding Mr. Kobayashi's absolute unfettered and unsupervised control of the assets and income of Mrs. Nakano, a mentally and physically incapacitated elderly person, the court is forwarding a copy of this Memorandum Decision to the Elder Abuse Division of the Los Angeles County District Attorney's Office.

IT IS SO ORDERED.

Date: June 26, 2019

Robert Kwan
United States Bankruptcy Judge